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September 13, 2022

**By ECF**

Honorable John G. Koeltl  
United States District Court for the Southern District of New York  
Daniel P. Moynihan United States Courthouse  
500 Pearl Street  
New York, NY 10007-1312

**Re: Phyto Tech Corp. v. Givaudan SA, 1:19-cv-09033-JGK**

**Briefing on Liquidating Trustee's Final Report and Motion for Approval of the  
Trustee's Proposed Wind Up and Dissolution of BGN Tech, LLC**

Dear Judge Koeltl:

We represent Andrew De Camara, in his capacity as the Court-appointed liquidating trustee (the "Trustee") of BGN Tech, LLC ("BGN").

On August 5, 2022, the Trustee filed the *Liquidating Trustee's Final Report and Motion for Approval of the Trustee's Proposed Wind Up and Dissolution of BGN Tech, LLC* [D.I. 85] (the "Motion"), seeking approval of the Trustee's proposed compromise and wind up of BGN. On August 8, 2022, the Court set a briefing schedule on the Motion, requiring that (i) objections to the Motion be filed by August 2, 2022, (ii) responses to such objections be filed by August 31, 2022, and (iii) further replies be filed by September 9, 2022.

On August 22, 2022, one of the members of BGN, Givaudan SA ("Givaudan"), filed its objection to the Motion [D.I. 87] (the "Givaudan Objection"). The Trustee filed its reply in support of the Motion on August 31, 2022 [D.I. 88]. The other member of BGN, Phyto Tech Corp., also filed a pleading supporting the Motion on August 31, 2022 [D.I. 89]. On September 9, 2022, Givaudan filed a response to the Trustee's reply [D.I. 92] (the "Givaudan Sur-Reply").

The Givaudan Sur-Reply improperly raises arguments and factual assertions for the first time that were not raised in Givaudan's initial papers – the Givaudan Objection. *See Bravia Capital Partners, Inc. v. Fike*, 296 F.R.D. 136, 144 (S.D.N.Y. 2013) ("[A]rguments may not be made for the first time in a reply brief.") (citing *Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir.1993)); *Morgan v. McElroy*, 981 F. Supp. 873, 876 n. 3 (S.D.N.Y. 1997) ("It is well settled in the Second Circuit that a party may not raise an argument for the first time in his reply brief.").

# Katten

September 13, 2022

Page 2

These new arguments were untimely raised to cure a fatal defect in Givaudan's Objection, which failed to assert that the Trustee's proposed determination was an abuse of discretion, among other things. To address this new issue, as well as the procedural issues created thereby, on the merits, the Liquidating Trustee requests leave to file a further response to the Givaudan Sur-Reply or, alternatively, a motion to strike the Givaudan Sur-Reply.

We appreciate your attention to this matter.

Respectfully submitted,  
/s/ David A. Crichlow  
David A. Crichlow

cc: All parties of record.